

**4. Purported consumer preferences for bundling would hamper local competition if BellSouth is allowed to provide long distance prematurely.**

To the extent that consumers in fact prefer to receive bundled telecommunications services (as BellSouth alleges in its brief, at 96-98), this preference would weigh strongly against permitting BellSouth's entry into long distance while BellSouth has a unique and unjustified ability to provide bundled local and long distance services to every customer in its region. Immediate entry at this stage in the development of competition would therefore give BellSouth a wholly artificial and illegal advantage in competing for long distance customers, and unfairly reducing the base of long distance customers would make entry into local markets more difficult and expensive.

BellSouth already serves virtually every customer in the relevant market (the BellSouth service area in Louisiana), and the moment it receives in-region interexchange authority, BellSouth will immediately be able to offer each customer facilities-based local services bundled with resold long distance (which is available to BellSouth at very advantageous rates due to the highly competitive long distance market). By contrast, none of BellSouth's competitors provides interLATA services to more than a portion of the relevant market, and local competition (both facilities-based and resale) is just becoming established in Louisiana. Whereas BellSouth will be able to take immediate advantage of a well-established and smoothly functioning wholesale market for long distance and to offer robust long distance services to every single one of its local customers on the day it obtains in-region authority, its competitors will be forced to struggle with the many uncertainties and difficulties involved in inaugurating local competition and will not be able to offer ubiquitous local service throughout Louisiana. See Baseman Decl. ¶ 65. The way to maximize consumer benefits is to let competition for local services develop first so that competition for bundles of local and long distance service can occur. Of course, if BellSouth were allowed into the in-region long distance market now, the likelihood that it

would cooperate in making resold and other local services available consistent with the requirements of the Act would approach zero.

**5. BellSouth's economic studies are baseless.**

BellSouth's brief claims that numerous economic benefits will flow from the approval of its application to provide in-region long distance, including significant decreases in long distance rates and increases in economic activity. See BST Br. 100-101. Yet the studies on which BellSouth bases its claims are fundamentally flawed. For example, BellSouth relies heavily on a study by WEFA that, among other erroneous and implausible assumptions, suggests that long distance prices have been increasing over time. Quite simply, in the words of Professor Hall, "the WEFA Study has no scientific value." Hall Decl. ¶ 231. The claim advanced by BellSouth that the postponement of BOC long distance entry costs U.S. residential consumers \$7 billion each year is equally preposterous. See BST Br. 83. Most fundamentally, the analysis used to support this claim does not account for the gains to local competition from delaying BOC entry or the harm to long distance competition. In addition, the analysis assumes that all long distance customers are currently paying the relatively higher long distance prices charged by AT&T. See Hall Decl. ¶ 197. Professor Hall's analysis is supported by the detailed review of BellSouth's economic forecasts conducted by Professor Marius Schwartz, DOJ's economic expert. See Schwartz Supp. Aff. ¶¶ 61-85. Professor Schwartz demonstrates that the benefits to long-distance competition from BOC entry are much less than BellSouth claims: The BOCs will have few incentives to cut long-distance prices, may seek to divert market share from IXCs rather than raise long-distance output, and are unlikely to disrupt the alleged interLATA oligopoly. See id. ¶¶ 64-77. In addition, Professor Schwartz' analysis shows that BellSouth's postulated benefits from its entry into the interLATA market are inflated due to various methodological errors in studies performed by BOC economic witnesses. These errors include assuming that all interLATA traffic

originates in BOC regions, failing to take into account the substantial competition for high-volume customers, and overstating actual price reductions that have occurred in SNET and GTE territories. See id. ¶¶ 78-85.

**D. Approval of BellSouth's Application Would Create Ample Opportunities for Discriminatory Behavior.**

BellSouth contends that a number of factors -- including revised regulations, technological developments, and pricing reform -- will preclude it from engaging in anti-competitive, discriminatory behavior if it is allowed into long distance. See BST Br. 101-19. Yet none of these factors adequately constrains BellSouth. It is in the interests of BellSouth's shareholders to prevent as much local competition as possible and to leverage its local monopoly into the downstream long distance market. Hall Decl. ¶¶ 56-57. The premise of the Act is that only the establishment of vibrant local competition will operate as a reliable constraint on BellSouth's underlying economic motivations.

**1. Effectiveness of Regulation**

Regulation, while important in fostering local competition, is not a sufficient constraint on the behavior of the BOCs. Congress rejected any contrary claim when it refused to allow immediate BOC provision of in-region interexchange services once the BOCs implemented the checklist and demonstrated prospective compliance with section 272. The Commission has noted the limitations of regulation, remarking in its discussion of the Bell Atlantic-NYNEX merger that "even while subject to regulation, a firm can exercise market power if, for example, (1) a price cap fails to lower prices for services to competitive levels, (2) a bundled product offering, such as combined local and long distance service, is only partially price-regulated, or (3) quality is difficult to specify and monitor."

BA/NYNEX Order ¶ 11.

Moreover, BOCs have many opportunities to frustrate or postpone the impact of regulations. A determined incumbent can significantly delay the onset of competition by raising numerous meritless challenges to regulatory proceedings and arbitrations<sup>62</sup>; BellSouth appears to have taken exactly this approach in its region.<sup>63</sup> In these circumstances, regulation is not effective, because it takes too long to have an effect and remedies (injunctive as well as compensatory or deterrent) are inadequate. See generally Hall Decl. ¶ 60 (noting delays attendant to remediation proceedings). DOJ's economic expert has summarized the issue forcefully:

Allowing BOC entry before the main systems for local competition are in place and attempting to mandate their implementation ex post would embroil us in a regulatory morass as it has in the past: having little incentive to comply, the BOCs would fight every requirement, and regulators would be hard pressed to dispute them[,] especially as regards implementation of new arrangements.

Schwartz Supp. Aff. ¶ 42.

An incumbent local carrier can also frustrate regulation by taking the narrowest possible view of regulatory requirements, thus requiring competitors to contest the incumbent's interpretations on a case-by-case basis. BellSouth has done just this in Georgia, where it first claimed that a particular form of subloop unbundling was not technically feasible. Only after the state commission ruled that the subloop unbundling was feasible did BellSouth admit (via its SGAT) the feasibility of this form of unbundling. See Baseman Decl. ¶ 19 n.12. As discussed further below, the rapid pace of technological change provides BOCs ample opportunities to discriminate against competitors. In short, an incumbent local exchange carrier will have many avenues for thwarting regulation in the course of

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<sup>62</sup> In the Michigan Order, the FCC implicitly acknowledged the limitations of regulation when it discussed the need for CLECs to avoid lengthy and contentious negotiations or legal proceedings with BOCs that might result from the absence of adequate performance standards. See Mich. Order ¶¶ 392, 394.

<sup>63</sup> For a list of Commission rulings that BellSouth has challenged, see supra part IV.B.

discriminating against its competitors.<sup>64</sup>

## 2. Technical Discrimination

BellSouth argues that reporting requirements and the sophisticated nature of its competitors will make technical discrimination impossible. See BST Br. 107-11. In the rapidly evolving telecommunications arena, however, technical discrimination with respect to the introduction of new services or equipment is even more likely than ever. See Affidavit of Dale N. Hatfield on Behalf of MCI, filed in CC Docket No. 97-137, at 3-4 (June 5, 1997) (ex. I hereto). Whereas prior to BOC participation in long distance, a BOC would have incentives to cooperate with long distance carriers in introducing new features (as the added traffic would raise its revenues), a BOC that is providing long distance service itself would have every incentive to frustrate efforts by its long distance competitors to introduce new features. See Baseman Decl. ¶ 21. (Obviously, at no time would a BOC have an incentive to cooperate with a CLEC in the introduction of new technologies, especially absent the long distance entry incentive.) Technical collaboration between companies is difficult to monitor and regulate; the uncertainties involved in implementing new technologies create many opportunities for incumbent local carriers to mask anti-competitive discrimination behind claims of technical

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<sup>64</sup> BellSouth argues that the Commission's decision finding that the merger of MCI and BT is in the public interest somehow requires it to approve this application. BST Br. 113-14. The Commission analyzed the MCI-BT merger under sections 214 and 310 of the Communications Act, which establish a framework that, among other goals, encourages foreign jurisdictions to adopt procompetitive policies by permitting carriers in competitive foreign markets to enter U.S. markets. Although the Commission did not agree with some of the choices made by regulators in the United Kingdom, the Commission agreed that their policies have made the United Kingdom's telecommunications markets among the most competitive in the world (including interconnection charges that are among the lowest in the world). Mem. Opinion and Order, ¶¶ 177-98, 224-46, Merger of MCI Communications Corp. and British Telecomm. plc, GN Docket No. 96-245 (rel. Sept. 24, 1997) (FCC 97-302). The substantial and increasing facilities-based competition in the U.K. indicates that U.K. markets are irreversibly open to competition and helps to explain why no competitor of MCI even alleged that BT has engaged in any favoritism toward MCI during the several years that BT has been vertically integrated into markets for international services while having a substantial investment in MCI.

infeasibility. See Hatfield Aff. at 14-28; Baseman Decl. ¶¶ 21-24.

### 3. Cost Shifts, Access Charges, and Price Squeezes

BellSouth additionally argues that it will not be able to discriminate on the basis of cost or price. See BST Br. 103-07. Yet it will necessarily possess a number of potent and discriminatory cost and pricing tools -- including those relating to cost-shifts, access charges, and price squeezes -- at least until local competition is more firmly established in Louisiana.

Even given price cap regulation, cost-shifting is still a potential source of economic inefficiency. Price cap regulation requires reference to some cost standard, and BellSouth will have an incentive to shift costs as long as there is the possibility that regulators will increase the price cap in response to declining profits or maintain a price cap when it should be reduced. See Hall Decl. ¶¶ 62, 115-19. Moreover, the Commission has acknowledged that price cap regulation may fail to create price levels consistent with competition and leave significant incentives and opportunities for anticompetitive behavior. See BA/NYNEX Order ¶ 11.

As long as access charges have not been reduced to economic costs, BellSouth's long distance affiliate will have a significant competitive advantage. Despite the Commission's access charge reforms, access is still priced well above cost and is likely to remain so, especially absent the development of healthy local competition.<sup>65</sup> Access charges that are above cost automatically give BOCs significant competitive advantages, in that their marginal cost of access for the company as a whole is much lower than the marginal cost of access paid to them by their competitors. Although BOCs are required to impute access charges to their long distance affiliates, imputation is only a bookkeeping measure that does not provide any real protection to competitors. Due to above-cost

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<sup>65</sup> See Hall Decl. ¶ 95; see also Access Charge Reform Order (FCC 97-158), ¶ 265 (predicting that access charges will be reduced to cost through competition).

access charges, BOCs are able to engage in a variety of practices, including non-linear pricing strategies, that distort the marketplace and inhibit competition. See Baseman Decl. ¶¶ 27-36.

Although the Commission has downplayed the risk of price squeezes (that is, the practice of charging competitors high prices for necessary inputs such as exchange access while offering low retail prices for competitive services such as long distance, thus forcing competitors to either lose customers or to operate at a loss),<sup>66</sup> regulation is no more a panacea for price squeezes than it is for other kinds of anticompetitive abuses.<sup>67</sup>

In sum, regulation is only partially effective, rapid technological evolution provides numerous opportunities to create competitive stumbling blocks, and BOC cost and pricing strategies can easily stifle competition. The safest way to ensure that local competition develops and that interexchange competition remains undiminished is to enforce section 271, including a restriction on in-region interexchange services until local competition has become irreversibly established. At that point, a BOC's customers (both telecommunications consumers and providers) will be able to avoid the BOC's network, should they face discrimination from the BOC. Also at that point, the BOC will be less likely

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<sup>66</sup> Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Marketplace, FCC No. 97-142 (rel. Apr. 18, 1997), ¶¶ 128-29.

<sup>67</sup> Moreover, the Eighth Circuit's July decision invalidating the Commission's pricing regulations for interconnection and unbundled network elements, together with its recent decision on rehearing to invalidate the Commission's rule concerning nondiscriminatory provision of existing combinations of network elements, has increased the potential that incumbent local exchange carriers such as BellSouth will be able to engage in price squeezes. In its decision approving Bell Atlantic's merger with NYNEX, even before the Eighth Circuit's ruling on combinations, the Commission noted that "we are less convinced today that we may generally rely on the availability of interconnection and UNEs to provide alternatives to exchange access services in light of the Eighth Circuit's decision" and thereby to prevent price squeezes. BA/NYNEX Order ¶ 117.

to discriminate, because it will know that it no longer has the only local exchange service game in town.

**E. BellSouth's Premature Entry into Long Distance Would Harm the Development of Local Competition in Louisiana.**

One of BellSouth's most perverse arguments is its claim that it should be allowed to offer long distance now to spur local competition in Louisiana. See BST Br. 119-20. In fact, approval of BellSouth's application would have exactly the opposite consequence: BellSouth's premature entry into long distance in Louisiana would devastate the incipient local competition in the state and harm the ability and incentive of interexchange carriers to enter local markets.

**1. Congress required local competition first, then long distance entry.**

BellSouth's argument that it should be allowed into the long distance market in Louisiana now is really a disagreement with Congress' refusal in the Act to lift the long distance restriction immediately. While Congress chose to lift certain other restrictions imposed on the BOCs by the MFJ, Congress maintained the restriction on in-region long distance entry pending approval by the Commission of BOC applications on a state-by-state basis. If Congress had intended that the BOCs should be allowed to offer in-region, interLATA services as a means of spurring local competition, it would not have enacted section 271. Under BellSouth's interpretation of the Act, the Commission could simply dispense with all further section 271 proceedings and allow all the BOCs into long distance now.

Of course, such an approach would be directly contrary to Congress' intent. The Act contains elaborate provisions, including the competitive checklist and the public interest test, designed to ensure that competition in local markets is established before opening the in-region long distance markets to the BOCs. In the words of Representative Forbes, "[B]efore any regional Bell company enters the long distance market, there must be competition in its local market." 142 Cong. Rec. E204 (Feb. 23, 1996).



Or, as Senator Hollings phrased it: “[C]ompetition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer’s disadvantage. . . . Telecommunications services should be deregulated after, not before, markets become competitive. 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996). The Act thus requires the establishment of local competition before BOC long distance entry.

**2. IXC’s and other local competitors have no strategic incentives to stay out of the local exchange market.**

Much of BellSouth’s baseless argument that its entry into long distance will spur local competition depends on the purported gamesmanship of the major IXCs, who allegedly have held back from entering the local market in Louisiana to prevent BellSouth from gaining long-distance entry and to thereby protect their long-distance market shares. This argument makes no sense because IXCs have a compelling incentive to provide local service -- among other reasons to pursue potentially substantial profit opportunities and to avoid inflated access charges. Henry Decl. ¶ 7. Moreover, this argument simply holds no water with respect to non-IXC CLECs, whose successful facilities-based entry could also trigger BellSouth’s ability to provide long distance. See Schwartz Supp. Aff. ¶ 29 (“If other entrants were to engage in . . . strategic delay then, assuming the local market were truly open to competition, it would pay any firm that currently has no presence (or only a small one) in the local and long distance markets to enter the local market aggressively to seize market share and exploit any first-mover advantages.”). As further discussed in the Baseman declaration, the first non-IXC CLEC to enter the market on a facility basis would have numerous avenues to profit, even if its entry caused BellSouth to be able to provide in-region long distance. See Baseman Decl. ¶ 76. Therefore, neither the non-IXC CLECs nor the IXCs have any tactical incentives to hold back from entering the market, once BellSouth truly opens its local market in Louisiana to competition. As DOJ’s economic expert

notes, this conclusion is borne out by actual experience in non-BOC territories, where there has been no evidence of greater entry into local competition than in BOC territories. See Schwartz Supp. Aff. ¶ 30.

### **3. PCS providers and other local companies currently pose no real threat to BellSouth's dominance in Louisiana.**

Having failed to demonstrate that its immediate entry into long distance would promote local competition, BellSouth makes a half-hearted attempt to show that local competition is already thriving in Louisiana, arguing that some CLECs might eventually offer facilities-based competition and that PCS providers already offer such competition. See BST Br. 121-23. Yet neither group is actually offering real competition as of the date of BellSouth's application, which is the only relevant question.

Facilities-based CLEC competition. The CAPS and cable television companies that BellSouth promotes as being well-situated to offer competition nevertheless are not in competition with BellSouth at this time. Even crediting BellSouth's assertion that these companies "are likely to be a source of facilities-based competition in a matter of months," BST Br. 121, it is obviously too soon to determine whether BellSouth's cooperation with its competitors is sufficient to justify interLATA entry. The proof of BellSouth's compliance with the requirements of the 1996 Act must be in the pudding of vibrant local competition.

PCS providers. BellSouth claims that PCS providers are able to offer effective competition to its ubiquitous local network. See BST Br. 16-17, 122-23. This argument ignores numerous, critical differences between wireless services such as PCS and wireline services. As discussed above, PCS is not competitive on a price basis with wireline service. Before PCS could become a substitute for the local loop, significant economic and technological hurdles would have to be overcome.

Arguing that PCS is increasingly accepted as a substitute for wireline services, BellSouth

claims that 17 percent of 8,000 PCS customers in Louisiana use PCS instead of wireline services. See BST Br. 16. Even accepting the validity of this statistic, it cuts against BellSouth's argument -- 17 percent of 8,000 customers works out to 1360 customers, or approximately 0.07 percent of the over 2 million switched access lines in Louisiana as of the end of last year. See FCC, Prelim. Stats. of Comm. Carriers Table 2.4 (June 30, 1997). Such a minuscule proportion of the local exchange market is not a credible competitive threat to BellSouth's monopoly of the Louisiana market.

**4. The benefits, if any, of immediate entry by BellSouth into the Louisiana long distance market are greatly outweighed by the harms to local and long distance competition.**

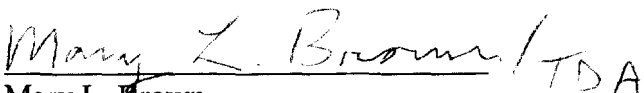
As demonstrated above, the public interest would not be served by the approval of BellSouth's application to offer long distance services in Louisiana. The harm to local competition is both glaring and substantial if BellSouth enters long distance now, while its compliance with the competitive checklist is grossly deficient. Only protracted, expensive regulatory proceedings that can offer at best delayed relief of limited effectiveness will stand between it and anti-competitive actions in both the local and long distance markets that are difficult to detect and prove. On the other hand, if the Commission waits to authorize in-region interexchange entry until local competition has become established, as required by the Act, the "carrot" of long distance entry will continue to encourage BellSouth to open its local markets to competition. Moreover, the marginal benefits of the addition of one more competitor to the already competitive long distance market are difficult to discern, and all indications are that BellSouth will not offer meaningful price competition to the existing long distance carriers. Premature entry would hurt, not help, both local and long distance competition.

**CONCLUSION**

For the foregoing reasons, BellSouth's application to provide in-region interLATA services in Louisiana should be denied.

Respectfully submitted,

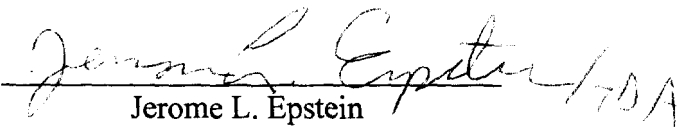
Jerome L. Epstein  
Marc A. Goldman  
Paul W. Cobb, Jr.  
Thomas D. Amrine  
Jeffrey I. Ryen  
JENNER & BLOCK  
601 13th St., N.W., 12th Fl.  
Washington, D.C. 20005  
202-639-6000

  
Mary L. Brown  
Keith L. Seat  
Susan Jin Davis  
MCI TELECOMMUNICATIONS  
CORPORATION  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
202-872-1600

November 25, 1997

CERTIFICATE OF SERVICE

I, Jerome L. Epstein, hereby certify that I have on this 25th day of November 1997, caused a true copy of the foregoing "Comments of MCI Telecommunications Corporation" to be served upon the parties on the attached list by hand, except where noted by Federal Express.

  
Jerome L. Epstein

## SERVICE LIST

### **Federal Communications Commission**

William Caton (Original + 11 Copies)  
Office of the Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, NW  
Washington, DC 20554

Janice Myles (5 Copies)  
Policy and Program Planning Division  
Common Carrier Bureau  
Federal Communications Commission  
Room 544  
1919 M Street, NW  
Washington, DC 20554

### **U.S. Department of Justice**

Donald J. Russell  
U.S. Department of Justice  
Antitrust Division, City Center Building  
1401 H Street, NW, Suite 8000  
Washington, DC 20530

Joel Klein  
Acting Assistant Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-001

### **Louisiana Public Service Commission**

BY FEDERAL EXPRESS  
Mr. Lawrence C. St. Blanc  
Secretary  
Louisiana Public Service Commission  
One American Place  
Suite 1630  
Baton Rouge, LA 70825

### **ITS**

ITS  
1231 20th Street, NW  
Washington, DC 20036

**Bell South Corporation**

Michael K. Kellogg  
Austin C. Schlick  
Kevin J. Cameron  
Jonathan T. Molot  
Kellogg, Huber, Hansen,  
Todd & Evans, P.L.L.C.  
1301 K Street, NW  
Suite 1000 West  
Washington, DC 20005